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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 630

RUTH F. IVES, formerly RUTH F. ISENSTEIN,
Petitioner,

v.

WILLIAM B. FRANKE, Secretary of the Navy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES H. MAYER
201-205 Tower Building
Washington, D. C.
Attorney for Petitioner

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Ruth F. Ives, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on September 17, 1959 and the Order denying rehearing entered on October 13, 1959.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix, pp. 1a through 13a) is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was first entered on September 17, 1959 and became final on October 13, 1959 when a petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Does the Secretary of the Navy have the authority to deny an Honorable Discharge to an enlisted woman marine being separated for disability and who has rendered "honest and faithful service" solely upon the ground that her average mark for proficiency was below that prescribed by regulations?

2. Can the Secretary of the Navy establish requirements for obtaining an Honorable Discharge which discriminate against enlisted persons and in favor of officers of the Marine Corps?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Amendment V—No person shall . . . be deprived of life, liberty or property without due process of law; . . .

United States Code

34 U. S. C. 492—Honorable discharges may be granted to all enlisted persons in the Navy. R. S. 1426, June 11, 1896.

10 U. S. C. 6291—Honorable Discharges, in the form prescribed by the Secretary of the Navy, may be granted to enlisted members of the naval service. Aug. 10, 1956, c. 1041, Sec. 1, 70A Stat. 391. Based on R. S. Sec. 1426; Act June 11, 1896, J. Res. 62, 29 Stat. 476—R. S. 1427 (Secs. 192 & 193 of former Title 34).

34 U. S. C. 194—It shall be the duty of every commanding officer of a vessel, on returning from a cruise, and immediately on his arrival in port, to forward to the Secretary of the Navy a list of the names of such of the crew as, in his opinion, on being discharged, are entitled to an "honorable discharge" as a testimonial of fidelity and obedience; and he shall grant the same to the persons so designated. R. S. 1429, Aug. 22, 1912.

34 U. S. C. 105i—(b) The Secretary of the Navy, under such regulations as he may prescribe, may terminate the enlistment of any enlisted woman in the Regular Navy or Marine Corps, and each such person whose enlistment is so terminated shall be discharged from the service. June 12, 1948, c. 449, Title II, Sec. 214, 62 Stat. 370.

10 U. S. C. 6294—The Secretary of the Navy, under regulations prescribed by him, may terminate the enlistment of and discharge any enlisted woman in the Regular Navy or the Regular Marine Corps. Aug. 10, 1956, c. 1041, Sec. 1, 70A Stat. 392. Based on Act June 12, 1948, c. 449 Sec. 214 (less (a)) 62 Stat. 370, Sec. 105i. of former 34.

STATEMENT OF THE CASE

Ruth Ives enlisted in the Women's Branch of the Marine Corps on February 2, 1952. (R. 6). During the next few months, she was assigned to various duties, and in July 1952 was promoted to the grade of Private First Class. (R. 16). Subsequently, she became ill and was hospitalized for a nervous or emotional disorder which was diagnosed to have existed prior to her enlistment. (R. 10). The Board of Medical Survey determined her to be physically disabled for naval service but not as a result of her own misconduct, and recommended that she be discharged from the service. (R. 10). Miss Ives waived her right to a hearing before a Physical Evaluation Board. (R. 14) (to which hearing she was entitled if she wished to contest the recommendation that she be discharged for physical disability) and on October 22, 1952, she was separated from the service administratively because of physical disability. (R. 12, 13). The record does not indicate that she was told that she would receive a General Discharge rather than an Honorable Discharge; in fact, on the Report of Separation from the Armed Forces, which petitioner signed at the time she left the service, the single word "Discharge" appears, (R. 12, item 7) and the reason given is "Disability and Medical Sur(vey)." (R. 12, item 8).

The discharge issued to petitioner was a General Discharge rather than an Honorable Discharge. (R. 2, 20, 24). The sole reason for issuing her this lower grade discharge was that her average mark for *proficiency* was slightly below that required by Marine Corps regulations as a prerequisite for an Honorable Discharge upon being separated for physical disability. (R. 27, 31, 32-33). These regulations require enlisted

persons to excel 40 per cent (40%) of those of the same rank performing the same or similar duties in order to obtain an Honorable Discharge. (R. 15-16, 37). No contention has been made by the respondent nor is there anything in the record to indicate that petitioner at any time failed to devote her best efforts to her duties. Petitioner's average mark for *conduct* more than satisfied the requirements for an Honorable Discharge. (R. 17). Historically, an Honorable Discharge was issued to all persons whose conduct while in service was satisfactory, but in 1945 the Marine Corps embarked upon its policy of withholding Honorable Discharges for lack of proficiency. (R. 45).

Petitioner, after exhausting her administrative remedies, filed suit in the United States District Court for the District of Columbia against the then Secretary of the Navy seeking a declaratory judgment that she was entitled to an Honorable Discharge and a mandatory injunction that she be issued one. (R. 2-4). The jurisdiction of the District Court was based upon Title 11, Sections 305 and 306 of the D. C. Code of Laws, and upon the Declaratory Judgment Act, 28 U. S. Code 2201 and 2202, and on 5 U. S. Code 1000. The District Court granted a motion for summary judgment in favor of the Secretary and the Petitioner appealed to the U. S. Court of Appeals for the District of Columbia Circuit. (R. 42). While the case was pending in that court, the then Secretary, Thomas S. Gates, Jr. resigned and the present Secretary, William B. Franke, was substituted as appellee upon motion of petitioner and order of the court dated August 24, 1959. (R. 52). On September 17, 1959, the Court of Appeals by a two-to-one decision affirmed the judgment of the District Court, Judge Bazelon

dissenting. On October 13, 1959, the Court of Appeals denied a petition for rehearing, and the petitioner now brings this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The substantial federal question involved is whether the Secretary of the Navy has the power, express or implied, to deny an Honorable Discharge to enlisted marine personnel solely on the ground of failure to meet standards of proficiency fixed by him. The majority of the Court below, relying on a statute[1] which is a general authorization to prescribe regulations terminating the enlistment of enlisted women in the Marine Corps, read into this statute the power to include proficiency as a prerequisite to an Honorable Discharge saying, "there is no connotation of dishonor in a General Discharge which expressly recites that it is 'under honorable conditions'".[2] The dissenting opinion, (Bazelon, J.) while conceding that the statute gives the Secretary "discretion" in prescribing regulations respecting discharges, holds that there are limits on that discretion imposed by historical precedent which preclude the Secretary from withholding an Honorable Discharge for lack of proficiency irrespective of the effort exerted by the serviceman. The question is thus posed whether the

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[1] 34 U. S. C. Section 105i(b).

[2] Opinion below, App. p. 3a. But Air Force Regulation No. 39-10, dated March 17, 1959, Paragraph 8 a. states "... *a General Discharge has been found to be a definite disadvantage to an airman seeking civilian employment.*" (Emphasis supplied.)

statute authorizes the Secretary to do what all history and precedent indicates he may not do.[3]

This question has not been but should be decided by this Court because it is a federal question of general and continuing importance to a large segment of the population. The regulations and instructions promulgated by the Secretary of the Navy, presumably under the authority of this statute, automatically prevent 40 per cent of all enlisted marines from obtaining an Honorable Discharge.[4] That a large number of marines are receiving General Discharges is manifest by the figures submitted to the lower court by respondent (appellee below).[5] These large numbers will undoubtedly be increased by virtue of a directive issued by the Department of Defense *after the hearing of this case in the District Court*, which now authorizes *all* three military departments to use the criterion of pro-

[3] See precedents cited in Judge Bazelon's dissenting opinion (App. pp. 7a-8a). Even in the case of *Davis* vs. *Woodring*, 72 App. D. C. 83, 111 F. 2d 523, cited by the majority, there is an indication set forth in footnote 4 that an honorable discharge is to be awarded as a testimonial of honest and faithful service.

[4] These regulations and instructions are found at R. 37 and R. 15-16 respectively. An average mark of 3 in proficiency is required for an Honorable Discharge, and a mark of 5 is given where a marine excels at least 40% and not more than 60% of all other marines of the same rank. Petitioner, despite her emotional and mental difficulties, had a final average mark of 4.25.

[5] See Exhibit 5 to Appellee's memorandum (R. 44-45). In Judge Bazelon's dissenting opinion (App. p. 5a) he indicates that 5,659 marines received General Discharges in the year 1952. Of these, it is not possible to pin-point the number receiving this type discharge through lack of proficiency because, according to appellee, it would be too expensive to provide this information (R. 45).

ficiency in determining entitlement to an Honorable Discharge.[6]

If the lower court's decision is allowed to stand, untold numbers of enlisted men and women who volunteer for or who have been drafted into their country's service and who have rendered "honest and faithful service" can now be branded for life with the stigma[7] of a less than Honorable Discharge merely because of ineptitude, or an "incapacity of nature or circumstances for which the individual is not at fault",[8] and irrespective of the effort exerted or the perfection of conduct of such servicemen and women.[9] Whether the authority to create such a situation has ever been granted by Congress or contemplated by it, or, indeed, could be authorized under the Constitution, is one which should be decided by this Court.

2. Another reason for granting the writ in this case is that this Court should decide the question of whether the Secretary of the Navy has the power to establish proficiency criteria for entitlement to an Honorable Discharge which flagrantly discriminate between officers and enlisted personnel. Under the present regulations, officers may obtain an Honorable Discharge even though their proficiency may be found wanting,

[6] D. O. D. Directive Number 1332.14, dated January 14, 1959, Paragraph VI, A 2.

[7] See footnote 2.

[8] Dissenting opinion below, App. p. 8a.

[9] The effect of the lower court's ruling can be especially severe upon those older servicewomen who, upon reaching the menopause, find their ability to render proficient service severely limited because of their physical condition.

provided that this is not due to a lack of effort on their part.[10] No such allowance is made in the case of enlisted persons.[11] They must either obtain the required grade for proficiency or fail to be awarded an Honorable Discharge, even though their conduct be of the highest order and even though they may have exerted the best efforts of which they are capable. This is a continuing discrimination which works to the disadvantage of enlisted persons. This Court should decide whether there is any foundation in law for such a double standard relating to something as fundamental as the character of a discharge which will be carried over into civilian life and will affect an individual for the rest of his days. This Court has already recognized that the character of a discharge is a right to be protected by law.[12] It should now decide whether this right can be dispensed on an easier standard for commissioned officers than the standard applied to enlisted persons.

[10] Marine Corps Manual, Paragraph 10001, provides for an Honorable Discharge to be issued to an officer who is separated for administrative reasons such as academic failures *despite honest effort*, and personality defects or physical deficiencies *despite which the individual concerned is believed to have performed service to the best of his ability.* (Emphasis supplied.) This paragraph further provides for a General Discharge where the separation is for academic failures *due at least in part to lack of effort*, or for personality defects or physical deficiencies *unaccompanied by a record of performance deemed to represent the best of which the individual is capable.* (Emphasis supplied.) (R. 34-35).

[11] Marine Corps Manual, Paragraph 10269, provides without qualification for an Honorable Discharge for an enlisted person being separated for disability whose minimum final average marks are 3 in proficiency and 4.0 in conduct. (R. 37).

[12] *Harmon* v. *Brucker*, 355 U. S. 579.

3. In holding that the Secretary may condition the award of an Honorable Discharge upon proficiency, in the absence of express language in the statute authorizing him to do so and in the face of historical precedent to the contrary, the lower court is in conflict with the principles announced by this Court in *Greene* v. *McElroy*, *U. S. Sup. Ct.*, June 29, 1959, wherein this Court held that the traditional forms of due process and fair procedure could not be restricted by implication and without the most explicit action by the Nation's lawmakers.[13] In *Harmon* v. *Brucker*, 355 U. S. 579 this Court held that the right to an Honorable Discharge was protected by law, and that the Secretary's action must be measured by the statute authorizing him to act. In the case at bar, the lower court is content to read power into the statute based upon their apparent view that there is no serious disadvantage in receiving a General Discharge rather than an Honorable Discharge, even though the Air Force, at least, recognizes such a disadvantage does exist.[14] This refusal to recognize the rule in *Harmon* is alone sufficient reason for the writ to be granted.

There are thus before this Court for consideration vital questions of far-reaching significance as to the scope and extent of the power of the Secretary of the Navy (and of the other service Secretaries) over the fate and future of enlisted personnel. The need to clarify the contradictions inherent in the decision below, when read against earlier decisions by this Court, and the impact of such conflict on the strength and power of the armed forces all emphasize the urgent need for a resolution of these issues by this Court.

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[13] Slip opinion, p. 33.

[14] See footnote 2.

CONCLUSION

The issues herein involve substantial and important questions of Federal law affecting a large segment of the population which should be decided by this Court.

Respectfully submitted.

CHARLES H. MAYER
Attorney for Petitioner
201-205 Tower Building
Washington, D. C.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,956

RUTH F. IVES, formerly RUTH F. ISENSTEIN, APPELLANT

v.

WILLIAM B. FRANKE, Secretary of the Navy, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided September 17, 1959

Mr. Charles H. Mayer, for appellant.

Mr. Edgar T. Bellinger, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee. *Mr. Nathan J. Paulson*, Assistant United States Attorney, also entered an appearance for appellee.

Before WILBUR K. MILLER, BAZELON and BASTIAN, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge*: Ruth F. Ives enlisted in the Marine Corps February 2, 1952. After having been hospitalized for some six weeks for treatment of an emotional or nervous disorder, she was discharged October 22, 1952, because of disability. As her proficiency rating did not reach the minimum required by Marine regulations for an honorable discharge, there was issued to the appellant a general discharge under honorable conditions, which she accepted.

Having unsuccessfully invoked available administrative remedies, Miss Ives sued September 15, 1958, in the Dis-

trict Court seeking a declaration that she was entitled to an honorable discharge, and a mandatory injunction to compel its issuance. She attacked the Secretary's issuance of her discharge certificate as arbitrary, capricious, unlawful and violative of the due process clause, thus in effect attacking the regulations under which he acted. The District Court granted summary judgment to the Secretary of the Navy, whereupon this appeal was taken.

There is no statute prescribing the form or terms of discharge certificates for use by the Marine Corps. That being true, the Secretary of the Navy could by regulation provide for different forms of discharge, even if he were without express statutory authority to do so. *Davis* v. *Woodring*, 72 App. D. C. 83, 85, 111 F. (2d) 523, 525 (1940). But Congress has authorized the Secretary, under such regulations as he may prescribe, to terminate the enlistment of any woman in the Marine Corps.[1] As discharge is coincident with or immediately follows termination of enlistment, we think the authority to prescribe regulations governing termination of enlistment necessarily enables the Secretary to prescribe regulations concerning discharge following such termination, including the form and terms of the certificate evidencing it.

The Secretary of the Navy therefore acted lawfully in prescribing regulations describing and defining the various types of discharge certificates to be used by the Marine Corps. Those which define an honorable discharge as a result of disability and a general discharge under

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[1] 34 U. S. C. § 105i, which is in part as follows:

"(b) The Secretary of the Navy, under such regulations as he may prescribe, may terminate the enlistment of any enlisted woman in the Regular Navy or Marine Corps, and each such person whose enlistment is so terminated shall be discharged from the service."

honorable conditions as a result of disability are reproduced in the margin.[2]

The appellant's proficiency rating admittedly was less than 5. Hence, under the regulation, she was entitled to no more than a general discharge under honorable conditions. She contends, however, that the Secretary was not authorized "to condition the award of an honorable discharge upon the degree of proficiency of the service rendered by appellant" and that he acted unlawfully in doing so. We do not agree. We see no reason to forbid classification of discharges according to degrees of proficiency, especially since there is no connotation of dishonor in a general discharge which expressly recites that it is "under honorable conditions."

The appellant argues that Army and Air Force regulations concerning honorable discharges are more lenient

[2] Marine Corps Manual, paragraph 10269, Honorable Discharge for Disability:

> "2. An enlisted person discharged as a result of a disability, whether or not incurred in line of duty, provided not own misconduct, whose minimum final average marks are 5 in proficiency and 4.0 in conduct, and who has not been convicted by general court-martial or more than once by special court-martial, shall be given an Honorable Discharge, DD Form 256 MC. For the exception, see subparagraph 10251-3."

Marine Corps Manual, paragraph 10270, General Discharge for Disability:

> "1. Personnel discharged for any of the following reasons shall receive a General Discharge, DD Form 257 MC:
>
> "a. Disability, whether or not incurred in line of duty, provided not own misconduct, where final average marks are less than 5 in proficiency and 4.0 in conduct, or the record shows conviction by general court-martial or more than once by special court-martial, unless otherwise directed by the Commandant of the Marine Corps. For the exceptions, see subparagraphs 10269-2a and 10251-3."

The exceptions are not applicable here.

than those of the Marine Corps, and that "The difference in the requirements for an honorable discharge applied to persons similarly situated gives rise to a cause of action under the due process clause of the Fifth Amendment to the Constitution. . . . The due process clause requires that a statute (or regulation under a statute) must operate equally on all persons in like circumstances. In this case, the regulations did not operate equally upon all enlisted members of the Armed Forces and are, therefore, illegal."

The reasoning would require that there be but one set of regulations for all branches of the armed forces pertaining to the subject of discharges, regardless of any variation in the conditions and circumstances surrounding personnel in the several services. We are not prepared to order that the branches of our armed services be integrated to that extent.

Other reasons for reversal advanced by appellant have been considered but do not seem to us to require discussion.

Affirmed.

BAZELON, *Circuit Judge*, dissenting: While the General Discharge issued to appellant expressly indicates that her separation was "under honorable conditions," it is clear that there is a substantial "margin of value"[1] distinguishing it from an Honorable Discharge. The regulations involved here demonstrate this.[2] They provide for issuance of an Honorable Discharge—whether the separation is by reason of disability, expiration of enlistment or various other circumstances—where there has been (1) satisfactory conduct, (2) proficiency in performance of duty, and (3) no conviction by a general court-martial and no more than one conviction by a special court-martial. Absent any one of these conditions, something less than an Honorable Discharge is authorized unless the person has been decorated or was disabled as a result of action against the enemy.

According to instructions[3] issued in connection with these regulations, conduct and proficiency requirements are determined from periodic ratings by service superiors. For an Honorable Discharge conduct ratings must show "No offenses. Demonstrated reliability, good moral influence, sober, obedient, and industrious"; and proficiency-in-performance ratings must show a superiority over 40 per cent of those of the same rank performing the same duties.[4]

[1] *Haxmon* v. *Brucker*, 100 U. S. App. D. C. 190, 198, 243 F. 2d 613, 621 (1957), *reversed*, 355 U. S. 579 (1958).

[2] Pertinent portions of the regulations are set forth in an appendix to this opinion.

[3] Pertinent portions of the instructions are set forth in the appendix to this opinion.

[4] Thus, according to the instructions, 40% of those of the same rank performing the same duties would be unable to satisfy the proficiency rating requirement. However, it appears that in 1952, of 45,414 persons discharged from the Marine Corps, only 5,659, or approximately 8%, received General Discharges. And of this 8% no doubt many satisfied the proficiency requirement but failed

Appellant, who enlisted in the United States Marine Corps (women's branch) on February 2, 1952, was hospitalized on September 15, 1952, as a result of an undefined psychiatric condition. On October 22, 1952, she was discharged because of a "physical disability, namely emotional instability reaction #3210." No contention is made that this disability was the result of her own misconduct or that she at any time failed to devote her best efforts to her duties. Her conduct rating amply satisfied the requirements for an Honorable Discharge. Her proficiency rating, however, fell below minimum requirements. Solely because of this deficiency, an Honorable Discharge was withheld and she was given a "General Discharge under honorable conditions."

Assuming — as the Government contends — that the General Discharge was issued in accordance with the Marine Corps regulations and instructions, I disagree with its further contention that courts may not inquire into their "propriety." In *Harmon v. Brucker*, 355 U. S. 579, 582 (1958), the Supreme Court held that the courts have "power to construe the *statutes* involved to determine whether the [Secretary] did exceed his powers." (Emphasis supplied.)

The statute which vests authority in the Secretary of the Navy to discharge appellant merely provides that

to satisfy other requirements for an Honorable Discharge. It cannot be assumed that there were a significant number of persons who, in spite of failure to meet the proficiency requirement, were awarded Honorable Discharges because of decorations, or because of a disability resulting from action against the enemy. Therefore it would seem that either (a) proficiency ratings were in fact higher than was contemplated by the instructions, or (b) the regulations relating to the character of the discharge were ignored in the majority of cases. If I did not consider that appellant is entitled to relief on other grounds, I would remand to the District Court for elucidation of this matter.

[5] But see note 4, *supra*.

"The Secretary of the Navy, under such regulations as he may prescribe, may terminate the enlistment of any enlisted woman in the Regular Navy or the Regular Marine Corps, and each such person whose enlistment is so terminated shall be discharged from the service."[6] Undoubtedly this provision gives the Secretary broad discretion in promulgating regulations governing the character of discharge to be issued to various classes of persons.[7] But limits upon the exercise of that discretion are imposed by historic precedent.

As far as I am able to determine, from the inception of our military establishment until recently, an Honorable Discharge has issued to all persons whose *conduct* while in service was satisfactory.[8] Indeed, the Marine

[6] 62 STAT. 370 (1948), 34 U. S. C. § 1051(b) (1952), as subsequently amended pursuant to codification, 70A STAT. 392 (1956), 10 U. S. C. § 6294 (Supp. V, 1958).

[7] See *Patterson* v. *Lamb*, 329 U. S. 539 (1947); *Davis* v. *Woodring*, 72 App. D. C. 83, 85, 111 F. 2d 523, 525 (1940); *Bernstein* v. *Herren*, 136 F. Supp. 493, 496 (S. D. N. Y. 1955).

[8] 13 OPS. ATT'Y GEN. 16, 18 (1869):

"... Regularly, an officer or soldier, upon his discharge from service, may be regarded as entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal; or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, &c., with either of which conditions an honorable discharge would be incompatible; but none of these circumstances here appears. ..." REV. STAT. § 1429 (1875), 34 U. S. C. § 194 (1952):

"Report of men entitled to honorable discharge. It shall be the duty of every commanding officer of a vessel, on returning from a cruise, and immediately on his arrival in port, to forward to the Secretary of the Navy a list of the names of such of the crew as, in his opinion, on being discharged, are entitled to an 'honorable discharge' as a testimonial of fidelity

Corps Honorable Discharge certificate itself states: "This certificate is awarded as a Testimonial of Fidelity and Obedience." It was not until March 1945 that the Marine Corps adopted its present policy of withholding Honorable Discharges for lack of proficiency, regardless whether such lack is attributable to an absence of effort, for which the individual is at fault, or to an incapacity of nature or circumstances for which the individual is not at fault. I do not believe that the governing statute authorizes such a basic alteration of historic precedent grounded in fairness. That precedent has become so entrenched in the public mind that anything less than an Honorable Discharge is commonly understood as an adverse reflection upon character.[9] And this understanding is hardly altered

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and obedience; and he shall grant the same to the persons so designated."

Regulations for the Army, 1913, as corrected to April 15, 1917, Art. XXI, paras. 148¾ 2 and 150, provided for issuance of a less-than-Honorable Discharge to a soldier who had become physically disqualified for service "through his own misconduct." These Regulations also indicated that a soldier discharged as "inapt" or as lacking in "adaptability" should receive the same form of less-than-Honorable Discharge though at the same time it was provided that an Honorable Discharge should be issued "when the soldier's *conduct* has been such as to warrant his enlistment and his service has been *honest and faithful*." (Emphasis supplied.) See *Patterson* v. *Lamb*, *supra*, 329 U. S. at 542, n. 5; *Davis* v. *Woodring*, *supra*, 72 App. D. C. at 84-85, 111 F. 2d at 524-25 (1940). The obvious conflict between these provisions was eliminated in the Army Regulations of 1923, AR 615-360, Sec. VIII, para. 53(b), which provided for the issuance of an Honorable Discharge where "the *conduct* of the enlisted man during his current enlistment has been such as would render his retention in the service desirable were it not for his inaptitude or lack of required adaptability for military service." (Emphasis supplied.)

[9] See *Harman* v. *Brucker*, *supra*, 100 U. S. App. D. C. at 197-98, 243 F. 2d at 620-21 wherein Government counsel conceded that "'every soldier gets an honorable discharge unless there is some *blemish* on his record on account of which he receives a discharge other than honorable.'" 100 U. S. App. D. C. at 202, 243 F. 2d at 625 (dissenting opinion). (Emphasis supplied.)

by the certificate of "General Discharge—under honorable conditions," since the regulations authorize its issuance to persons whose conduct has *not* been satisfactory.

For the foregoing reasons, I would reverse and remand to the District Court with directions that an order be issued enjoining the Secretary from refusing to issue an Honorable Discharge to appellant solely for lack of proficiency.

APPENDIX

Regulations

Marine Corps Manual, 1949, Part E, provides in pertinent part:

"10252 Honorable Discharge

"1. An honorable discharge requires excellent service, fulfillment of certain other conditions herein stated, and eligibility for discharge for one of the following reasons:

a. Expiration of enlistment.
b. Convenience of the Government.
c. Dependency or hardship.
d. Minority.
e. Disability.

"2. Excellent service is defined as being proficient in the performance of the duties commensurate with the rank held, being industrious and possessing a good conduct record, and having received a minimum final average of 5 in proficiency and 4.0 in conduct.

"3. An honorable discharge will not be issued if the enlisted person has been convicted of an offense by general court martial or has been convicted by more than one special court martial in his current enlistment, period of induction, or any extensions thereof, unless such enlisted person has been awarded a Medal of Honor, Marine Corps Brevet, Navy Cross, Distinguished Service Medal, Silver Star Medal, Legion of Merit, Distinguished Flying Cross, Navy and Marine Corps Medal, Bronze Star Medal, Air Medal, Commendation Ribbon, Gold Life Saving Medal, Silver Life Saving Medal or any Army award comparable to the decorations listed above. Personnel so decorated are entitled to an honorable discharge provided their record, subsequent to the act for which they were rewarded or commended would so entitle them. Also, a person discharged as a result of a disability incurred in line of duty and resulting from action against an enemy, shall normally be given an honorable discharge regardless of previous service record and previous conduct and proficiency marks.

"4. In an exceptional case where the commanding officer is of the opinion that the person concerned should not be given an honorable discharge in accordance with the foregoing instructions, a full report of the circumstances shall be forwarded to the Commandant of the Marine Corps for decision.

"10253 GENERAL DISCHARGE

"1. A general discharge is separation from the service 'under honorable conditions.' It is given for the same reasons as an honorable discharge and is issued to enlisted personnel whose conduct and performance of duty have been satisfactory but not sufficiently deserving or meritorious to warrant an honorable discharge. It is also given for inaptitude and unsuitability."

Instructions.

The instructions issued in connection with the foregoing regulations provide in pertinent part:

A. As to proficiency:

"3.a. The mark assigned in proficiency should reflect the marine's proficiency in performance of duty in comparison with the proficiency of all other marines of the same rank observed in performance of the same or similar duties. This comparison must be limited to marines of the same rank; however, it need not be limited to marines now under command of the marking officer. The mark in proficiency should be an objective evaluation of the marine's relative proficiency in performance of duty subsequent to the date the last mark was given; factors such as high rank, previous marks, etc., must not be considered. Marks in proficiency will not reflect the comparative general value to the service of marines in different pay grades. For example, a staff sergeant with a mark of 3 is considered to be of more value to the service than a corporal with a rank of 8.

"b. Proficiency, simply stated, means how well the marine performs the duty or duties assigned. In addition to technical skill and specialized knowledge pertinent to a particular job, such characteristics as leader

ship, physical fitness, and the like should be considered when they are definitely applicable. For example, leadership should be considered in all cases in which the marine was required to direct and control other marines in performance of their duty.

"c. The mark assigned will be a number from 1 to 9, inclusive, based on the following standards:

Mark	Indicates Marine Excels (Percent of all other marines of same rank)	
	At least	*Not more than*
9	96	100
8	89	96
7	77	89
6	60	77
5	40	60
4	23	40
3	11	23
2	4	11
1	0	4

"d. Based on the foregoing, the expected distribution of the marks of a random group of 100 marines of the same rank would be 4 percent with a mark of 9, 7 percent with a mark of 8, 12 per cent with a mark of 7, 17 percent with a mark of 6, 20 percent with a mark of 5, 17 percent with a mark of 4, 12 percent with a mark of 3, 7 percent with a mark of 2, and 4 percent with a mark of 1."

B. As to conduct:

"3. The following standards will be used as a guide in assigning marks in conduct; however, full discretion is left to commanding officers to deviate therefrom in individual cases for good and sufficient reasons:

"Unsatisfactory (0-1.9).—Habitual offender, or convicted by summary court martial or more than one deck court. If an unsatisfactory mark is assigned on a basis other than offenses entered on page 10, an entry shall be made there to explain the mark. A mark of 'Zero' shall be given upon desertion, and

for any period of confinement in a designated naval prison, pursuant to sentence of a general court martial.

"Fair (2.0-2.9).—No summary court martial, not more than one deck court or two commanding officers' punishments including confinement or reduction in rank for misconduct. Considered to meet minimum standards.

"Good (3.0-3.9).—No courts and not more than one commanding officer's punishment. Conduct such as not to impair appreciably his own usefulness nor the efficiency of the command.

"Very Good (4.0-4.4).—No offenses. Demonstrated reliability, good morale influence, sober, obedient, and industrious.

"Excellent (4.5-4.8).—No offenses. No unfavorable impressions as to attitude, interest, cooperation, obedience, after effects of intemperance, courtesy and consideration and observance of the spirit of regulations.

"Outstanding (4.9-5.0).—Positive favorable impression of the qualities listed above, and in addition a demonstrated positive effect on the conduct of others by example and persuasion."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1959

No. 14,956
Civil 2348-58

RUTH F. IVES, formerly RUTH F. ISENSTEIN,
Appellant,

v.

WILLIAM B. FRANKE, Secretary of the Navy,
Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, BAZELON and BASTIAN, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge WILBUR K. MILLER.

Dated: September 17, 1959.

Separate dissenting opinion by Circuit Judge Bazelon.

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No. 630

In the Supreme Court of the United States

OCTOBER TERM, 1959

RUTH F. IVES, formerly RUTH F. ISENSTEIN,
PETITIONER

v.

WILLIAM B. FRANKE, Secretary of the Navy

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
DAVID L. ROSE,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

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RUTH F. IVES, formerly RUTH F. ISENSTEIN,
PETITIONER

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WILLIAM B. FRANKE, Secretary of the Navy

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-9a) is reported at 271 F. 2d 469. The unreported order of the District Court for the District of Columbia appears in the Joint Appendix, p. 42.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1959. A motion for rehearing en banc was denied on October 13, 1959. The petition for a writ of certiorari was filed on January

5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Secretary of the Navy had authority to adopt regulations under which the petitioner was discharged from the women's branch of the Marine Corps with a general discharge under honorable conditions, rather than a honorable discharge, because of her failure to perform her duties with a minimum degree of proficiency.

STATUTES AND REGULATIONS INVOLVED

10 U.S.C. 6291 and 6294 provide:

§ 6291. Honorable discharges.

Honorable discharges, in the form prescribed by the Secretary of the Navy, may be granted to enlisted members of the naval service. [Based upon R.S. 1426, June 11, 1896, 29 Stat. 476.]

§ 6294. Women in the Regular Navy and Regular Marine Corps: termination of enlistment.

The Secretary of the Navy, under regulations prescribed by him, may terminate the enlistment of and discharge any enlisted woman in the Regular Navy or the Regular Marine Corps. [Based upon Act of June 12, 1948, c. 449, § 214, 62 Stat. 370.]

Marine Corps Manual, 1949, Part E provided (in 1952) in pertinent part:

10252 HONORABLE DISCHARGE

1. An honorable discharge requires excellent service, fulfillment of certain other conditions

herein stated, and eligibility for discharge for one of the following reasons:

a. Expiration of enlistment.
b. Convenience of the Government.
c. Dependency or hardship.
d. Minority.
e. Disability.

2. Excellent service is defined as being proficient in the performance of the duties commensurate with the rank held, being industrious and possessing a good conduct record, and having received a minimum final average of 5 in proficiency and 4.0 in conduct.

3. An honorable discharge will not be issued if the enlisted person has been convicted of an offense by general court martial or has been convicted by more than one special court martial in his current enlistment, period of induction, or any extensions thereof, unless such enlisted person has been awarded a Medal of Honor, Marine Corps Brevet, Navy Cross, Distinguished Service Medal, Silver Star Medal, Legion of Merit, Distinguished Flying Cross, Navy and Marine Corps Medal, Bronze Star Medal, Air Medal, Commendation Ribbon, Gold Life Saving Medal, Silver Life Saving Medal or any Army award comparable to the decorations listed above. Personnel so decorated are entitled to an honorable discharge provided their record, subsequent to the act for which they were rewarded or commended would so entitle them. Also, a person discharged as a result of a disability incurred in line of duty and resulting from action against an enemy, shall normally be given an honorable discharge regardless of previous service record and previous conduct and proficiency marks.

4. In an exceptional case where the commanding officer is of the opinion that the person concerned should not be given an honorable discharge in accordance with the foregoing instructions, a full report of the circumstances shall be forwarded to the Commandant of the Marine Corps for decision.

10253 GENERAL DISCHARGE

1. A general discharge is separation from the service "under honorable conditions." It is given for the same reasons as an honorable discharge and is issued to enlisted personnel whose conduct and performance of duty have been satisfactory but not sufficiently deserving or meritorious to warrant an honorable discharge. It is also given for inaptitude and unsuitability.

10269 HONORABLE DISCHARGE FOR DISABILITY

1. In effecting discharges for physical or mental disability, the character of discharge shall be given as indicated below unless otherwise directed by the Commandant of the Marine Corps. If a commanding officer believes an enlisted person is entitled to a character of discharge different from that indicated, he should so recommend to the Commandant of the Marine Corps, stating the reason therefor: see paragraph 10251-3.

2. An enlisted person discharged as a result of a disability, whether or not incurred in line of duty, provided not own misconduct, whose minimum final average marks are 5 in proficiency and 4.0 in conduct, and who has not been convicted by general court-martial or more than once by special court-martial, shall be given an Honorable Discharge, DD Form 256 MC. For the exception, see subparagraph 10251-3.

a. An enlisted person discharged as a result of disability incurred in line of duty and resulting from action against an organized enemy, shall normally be given an honorable discharge regardless of previous service record and previous conduct and final average marks. In any exceptional case where the commanding officer is of the opinion that the person should not be given an honorable discharge, a full report of the circumstances shall be sent to the Commandant of the Marine Corps (Code DGK) for a decision.

b. Enlisted personnel who upon reporting for active duty are found not physically qualified by reason of a disability which is reported on Standard Form 88, provided the disability is considered not due to own misconduct, shall be issued an Honorable Discharge, DD Form 256 MC, by reason of disability. Such discharges will be effected only when directed by the Commandant of the Marine Corps in individual cases.

10270 GENERAL DISCHARGE FOR DISABILITY

1. Personnel discharged for any of the following reasons shall receive a General Discharge, DD Form 257 MC:

a. Disability, whether or not incurred in line of duty, provided not own misconduct, where final average marks are less than 5 in proficiency and 4.0 in conduct, or the record shows conviction by general court-martial or more than once by special court-martial, unless otherwise directed by the Commandant of the Marine Corps. For the exceptions, see subparagraphs 10269-2a and 10251-3.

b. Disability due to own misconduct.

* * * * *

STATEMENT

The petitioner enlisted for three years in the Marine Corps (women's branch) on February 2, 1952 (J.A. 6-7). Prior to her enlistment she had attended college, where her major subject was psychiatric social service work, and had worked as a medical and psychiatric secretary (J.A. 8). Shortly before her enlistment she had applied for admission to a law school, and she enlisted on the assumption that her application had been denied. From the time she entered the service, her performance of her duties was poor and she regularly received low proficiency marks (J.A. 13-14). Although her behavior put her "in moderately serious difficulty on several occasions" (J.A. 9), her marks for conduct were average (J.A. 16-17).

Early in September, 1952, the petitioner requested a discharge from the Marine Corps. Her request was based upon "frustration resulting from her inability to do satisfactory work" on any of the five jobs she had had since entering the service. She also stated that she had been accepted by a law school, and that her assignments in the marines were "not commensurate with her intellectual endowment or ability" (J.A. 8-9).

Upon her request for a discharge she was referred to medical authorities "for psychiatric evaluation concerning her retention in the service" (J.A. 8). Her physical, neurological, laboratory and psychiatric examinations showed "no significant deviation from normal" (J.A. 9). Nevertheless, the medical board found that, although "fully competent to be dis-

charged into her own custody", she suffered from "an emotional instability reaction, characterized by fluctuating emotional attitudes, poorly controlled hostility and immature, impulsive judgment," which had existed prior to her entry into the service. The board recommended that she be discharged from the Marine Corps (J.A. 10). On October 20, 1952, upon being fully advised of the board's findings and recommendation, the petitioner acknowledged that she would not be entitled to disability benefits or other compensation, waived her rights to a hearing, and requested that she be discharged "as soon as possible" (J.A. 11). Prior to signing the waiver she apparently did not inquire about the character of the discharge which she would receive (J.A. 21). She was discharged on October 22, 1952 (J.A. 12-13) with a "General Discharge—under honorable conditions."

In November, 1953, the petitioner applied to the Navy's Board of Review, Discharges and Dismissals, for a review of her discharge (J.A. 19-20). That Board found that the petitioner's average grades in proficiency were not high enough to merit an honorable discharge, and that the character of the discharge originally issued was therefore proper (J.A. 27). The petitioner was informed of the Board's decision by letter dated February 1, 1954 (J.A. 28). In April, 1957, the petitioner took that decision to the Board for the Correction of Naval Records, which on July 23, 1957, found her appeal to be without merit (J.A. 29-32).

This action was brought on September 15, 1958 (J.A. 1). The parties agreed that there was no genuine issue of material fact and submitted the case on cross motions for summary judgment (J.A. 5). The district court was of the opinion that the defendant acted within his authority, and entered judgment for defendant (J.A. 42). The Court of Appeals affirmed (2-1), and denied a motion for rehearing *en banc* (8-1) (R. 72).

ARGUMENT

This case raises only one question, which the Court of Appeals decided correctly. The regulations attacked here, which make a minimum proficiency in the performance of duties one of the requirements for receiving an honorable discharge from the Marine Corps, are clearly valid. Review by this Court is therefore unwarranted.

In 1912, the Secretary of the Navy adopted regulations under which satisfactory performance of duty, as indicated by a prescribed minimum grade in proficiency, was a prerequisite to an honorable discharge for naval personnel.[1] Naval regulations with this requirement have remained in force ever since.[2] Even prior to that time enlisted personnel who did

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[1] See Circular letter of November 8, 1912, Appendix pp. 15-16, *infra*; this and other regulations are attached as an appendix to this brief for the convenience of the Court.

[2] *Bureau of Navigation Manual*, 1921, Para. D 8110; *Bureau of Navigation Manual*, 1925, Para. D 9101; *Bureau of Navigation Manual*, 1942, Para. D 9102; *Bureau of Naval Personnel Manual*, 1948, Para. C 10302; *Bureau of Naval Personnel Manual*, 1959, Para. C 10302.

not merit "a testimonial for fidelity, obedience, and *ability*" (emphasis added), received an "ordinary discharge" rather than an honorable discharge.[3]

In 1945, regulations were adopted for the Marine Corps which, like the Navy's, made a minimum grade in proficiency a prerequisite for an honorable discharge.[4] These regulations were substantially the same as those under which petitioner was discharged.[5] In 1947, the Army adopted similar requirements for honorable discharges,[6] and upon its acquiring the status of a separate service the Air Force did the same.[7] The Army, Navy, and Marines have retained these requirements.[8]

---

[3] Regulations for the Government of the Navy of the United States (1896), 801, paras. (1) and (2), Appendix p. 15. All personnel who were discharged at their own request before the expiration of their term of service also received only ordinary discharges. *Id.*, 802, para. (c).

[4] Exhibit 3 in the Court of Appeals.

[5] Marine Corps Manual, 1949, Part E, Paras. 10252, 10253, 10269, 10270, set forth above at pp. 2-5.

[6] Army Regulations 615-360 of May 14, 1947 (ratings of "excellent" in "efficiency" were required).

[7] Air Force Regulations 39-10 of September 21, 1949.

[8] The petitioner's suggestion that the other services have adopted the Marine Corps' requirement "after the hearing of this case in the District Court" (Pet. 7-8) is without foundation. D.O.D. Directive No. 1332.14, to which counsel refers, cites and replaces a D.O.D. memorandum of August 2, 1948, which also allowed the services to consider proficiency in determining awards of honorable discharges. See paras. 4(a) and (b) to enclosure B of that memorandum. Moreover, the applicable Air Force and Army regulations which were printed in the petitioner's brief in the Court of

Neither in the lower courts nor in this Court has the petitioner charged discrimination or unfairness in the application of the regulations to her.[9] Nor was there any allegation or evidence of unfair procedures.[10] Only the validity of the regulations, and the respondent's authority to enforce them, have been assailed.

The authority of the executive to promulgate regulations for the government of the armed forces is beyond question, and the regulations adopted by the head of the department are those of the executive. *United States* v. *Eliason*, 16 Pet. 291. This Court has recognized the executive's authority to promul-

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Appeals, show that acceptable ratings for "efficiency" were required for honorable discharges from those services. Appellant's Brief, pp. 4-5. The only recent change of policy was the elimination of minimum efficiency grades in the Air Force regulations in 1957. Air Force Regulations, 39-10A, change dated March 21, 1957. See Appellant's Brief, pp. 6-7.

[9] In a footnote, Judge Bazelon in his dissenting opinion suggests that the applicable instructions concerning proficiency grades may not have been followed because a smaller percentage of the marines discharged in 1952 received general discharges than the instructions might indicate (fn. 1, Pet. App. 5a-6a). However, the instructions do not require a literal percentile grading. The percentages set forth are only a guide to grades, and an officer is free to give all the men under his supervision high grades (J.A. 14-16, see para. 3a). At any rate, the petitioner has not complained of the proficiency grades awarded her. Nor could she, since her request for discharge was based upon her admitted failure to do satisfactory work (J.A. 8).

[10] The petitioner's reliance upon *Greene* v. *McElroy*, 360 U.S. 474, is therefore misplaced.

gate regulations governing the type and character of discharge certificates to be given to persons leaving the armed services and to award less than honorable discharges in appropriate situations. *Patterson* v. *Lamb*, 329 U.S. 539.

Honorable discharges awarded only for satisfactory conduct and performance are intended to be an award for a job well done. See *Harmon* v. *Brucker*, 355 U.S. 579. These regulations provide an incentive to the affected servicemen to perform their duties adequately. As such they are clearly and rationally related to the government of the armed services, and would be valid even without specific statutory authorization. *United States* v. *Eliason*, *supra*; *Patterson* v. *Lamb*, *supra*; *Davis* v. *Woodring*, 111 F. 2d 523 (C.A.D.C.).

The applicable statutes, moreover, specifically make the award of honorable discharges discretionary with the Secretary of the Navy,[11] and give him broad authority to prescribe regulations concerning the termination of enlistment and discharge of enlisted women in the Navy and Marine Corps.[12] In addition, Congress, after the adoption of regulations using proficiency as a criterion for the award of honorable discharges, enacted several statutes which recognized, but did not prescribe any criteria for the award of various kinds of discharges.[13] Many thous-

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[11] 10 U.S.C. 6291. The text is set forth at p. 2, *supra*.

[12] 10 U.S.C. 6294. The text is set forth at p. 2, *supra*.

[13] 10 U.S.C. 6297(b) (based upon Act of June 3, 1916, c. 134, § 125, 39 Stat. 216); 10 U.S.C. 1553 (based upon Servicemen's Readjustment Act of June 22, 1944, c. 268, § 301,

ands of servicemen have been discharged under them. Consequently any remaining doubt as to the validity of the regulations in question would be eliminated by this long standing administrative interpretation, and Congressional acquiescence in and ratification of it. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 310-315; *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 544-550; cf. *Greene v. McElroy*, 360 U.S. 474, 506.

Judge Bazelon's dissenting opinion below is based upon the premise that "until recently, an Honorable Discharge has issued to all persons whose *conduct* while in service was satisfactory" (emphasis added). While recognizing respondent's general authority to issue the regulations governing discharges, he believed that history had so bound honorable discharges to conduct, and not proficiency, that the respondents could not issue a less than honorable discharge for lack of proficiency (Pet. 7a-9a). His reasoning overlooks the principle, long established in this Court, that the authority to promulgate rules and regulations necessarily carries with it the authority to modify, repeal or establish anew. *United States v. Eliason*, 16 Pet. 291, 301. In addition, his premise

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58 Stat. 286, formerly found at 38 U.S.C. (1952 ed.), establishing administrative boards to review the kinds of discharges awarded); 10 U.S.C. 6292 (based upon Act of September 21, 1945, c. 385, § 1, 59 Stat. 536), which recognizes less than honorable discharges; 10 U.S.C. 1552 (based upon Act of August 2, 1946, c. 753, § 207, 60 Stat. 812, 837), establishing boards for correction of military records; 10 U.S.C. 1162 (based upon Act of July 9, 1952, c. 608, § 218, 66 Stat. 495).

was false because naval discharges have traditionally been awarded only to those who met the minimum standards of both conduct and proficiency."[11]

The petitioner also contends that the regulations are invalid because they "flagrantly discriminate between officers and enlisted personnel" (Pet. 8). We need not discuss the legal merit of the petitioner's position, because there is in fact no discrimination in this respect. The regulations for marine officers, like those for enlisted personnel, prescribe a general discharge rather than an honorable discharge for those whose service record shows "performance of duty of a consistently below average or unsatisfactory character" (J.A. 35, para. 3b(1)(d)).

The petitioner's service in the Marine Corps was neither dishonorable nor meritorious. Her general discharge (under honorable conditions) adequately reflects these facts. "The law demands no more." *Patterson* v. *Lamb*, 329 U.S. 539, 545.

---

[11] See above, pp. 8-9. Judge Bazelon apparently was unaware of the long history of the requirement of minimum grades in proficiency for honorable naval discharges. However, even the history of the Army regulations, on which his reasoning is based, does not show a long tradition of awarding honorable discharges solely on the basis of conduct, rather than proficiency. In the early years of this century, discharges without honor were given "[f]or inefficiency." Howland, *Digest of Opinions of the Judge Advocate General of the Army* (1912) 137, Para. III F. 1. During the World War I era, soldiers discharged as "inapt" received less than honorable discharges (Judge Bazelon's opinion, fn. 8, Pet. App. 8a). After 1922 the so-called "blue discharge" was given to those who failed to meet minimum standards of efficiency. Army Regulations 615-360 of December 6, 1922; see also *In re Fong Chow Chung*, 119 F. 2d 901, 905-906, fn. 1 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
DAVID L. ROSE,
Attorneys.

FEBRUARY 1960.

APPENDIX

Early Naval Regulations and Instructions from "Compilation of Discharge Regulations from 1896 to 1925" prepared by the Bureau of Personnel, Dept. of the Navy, December 1, 1947.

1. Regulations for the Government of the Navy of the United States of 1896 provided in pertinent part:

> 801. (1) Any person in the Navy, enlisted for general service, who is recommended by his captain for a testimonial for fidelity, obedience, and ability during his term of service, and who is a desirable person to retain, shall, upon the expiration of his enlistment, receive an honorable discharge.
>
> (2) When deciding upon the claim of an enlisted man to an honorable discharge, the captain must give due weight to the recommendations of all other captains under whom the man may have served during his current enlistment, as shown by his enlistment record.
>
> 802. The following persons are entitled to an ordinary discharge only:
>
> (a) All who enlisted for other than general service.
>
> (b) All general-service men who are not recommended by the captain for a testimonial for fidelity, obedience, and ability during their term of service.
>
> (c) All who are discharged before the expiration of their term of enlistment at their own request, or for their own convenience.

2. Circular letter entitled "For the Information of Commanding Officers, Nov. 8, 1912" provided in pertinent part:

7. *Determination of character of discharge.*—In deciding whether an honorable or an ordinary discharge shall be awarded, the following rules shall govern:

(a) The first year's record of men in their *first enlistment* shall not be taken into consideration.

(b) A record of 4.5 each in sobriety and obedience during the last two years of a first enlistment, together with not less than an average of 3.0 in proficiency in rating for those years, shall entitle a man to honorable discharge, unless his previous record shows him to be undesirable for the service.

(c) No honorable discharge shall be given (except under rule (b), next above) to any man whose averages in proficiency in rating, sobriety, and obedience are less than 3.0 each, giving double weight to the marks of the final two years of his term of service.

(d) A man that has been awarded a medal of honor shall be entitled to an honorable discharge regardless of his previous record, provided his record subsequent to the act for which he was rewarded is worthy of honorable discharge under rule (c) next above.

(e) Similarly, a letter of commendation shall be given due weight in a man's favor against a previous unworthy record, provided his record subsequent to the act commended would entitle him to an honorable discharge.

3. The Annual Circular, Bureau of Navigation, dated January 1, 1918, provided in pertinent part:

116. In deciding whether an honorable or ordinary discharge shall be awarded the following rules shall govern:

An honorable discharge is a TESTIMONIAL OF FIDELITY AND OBEDIENCE. An honorable discharge shall not be given any man who has been convicted by general court-martial during his current enlistment, or who has been convicted by two summary courts during his current enlistment, or by a summary court within the last year of his current enlistment. If, however, the offenses were of over liberty amounting to less than 12 hours in times of peace, and the record is otherwise excellent, an honorable discharge may be given at the discretion of the commanding officer if his average marks conform to the bureau's instructions. If his enlistment has been extended, this applies to the last four years of enlistment, including the extension period.

117. In order to make this rule uniform, men who break their liberty more than 12 hours under no extenuating circumstances should be considered as having had a summary court in deciding the character of the discharge.

118. No honorable discharge shall be given to any man whose averages are less than 3.0 each in sobriety and obedience and 2.75 in proficiency in rating, giving double weight to the marks of the final two years of his term of service.

119. A man who has been awarded a medal of honor shall be entitled to an honorable discharge regardless of his previous record, provided his record subsequent to the act for which he was rewarded is worthy of honorable discharge, under rule next above.

120. Similarly, a letter of commendation shall be given due weight in a man's favor against a previous unworthy record, provided his record subsequent to the act commended would entitle him to an honorable discharge.

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